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SUPREME COURT, U. S.

Nos. 1181 and 1182

In the Supreme Court of the United States

OCTOBER TERM, 1950

CITY OF NEW YORK

v.

UNITED STATES OF AMERICA, ET AL.

MARSHALL S. SILVERMAN AND S. JEROME TAMTEN

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEE

[redacted]

INDEX

	Page
Statement	1
Argument	6
Conclusion	16
Cases:	
Beacon Theatres, Inc. v. Westover, 359 U.S. 500	8
Dairy Queen, Inc. v. Wood, 369 U.S. 469	8
Lupton Manufacturing Co. v. United States, 388 U.S. 457	10
Mullane v. Central Hanover Tr. Co., 339 U.S. 306	15
Pioneer National Title Ins. Co. v. United States, 385 U.S. 1022	10
Swift & Co. v. United States, 276 U.S. 311	13
United States v. Blue Chip Stamp Co., 272 F. Supp. 432, affirmed *sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580	9, 10
United States v. Brunswick-Balke-Collender Co., 203 F. Supp. 657	11
United States v. Harper and Row Publishers, Inc. (N.D. Ill. 1967, unreported), affirmed *sub nom. City of New York v. United States*, 390 U.S. 745	9, 10
United States v. Lake Asphalt and Petroleum Co. of Mass., The, 1960 Trade Cases ¶69,835	5
United States v. Swift & Co., 276 U.S. 311	10
United States v. Swift & Co., 286 U.S. 106	10
United States v. Ward Baking Co., 376 U.S. 327	11, 15
Statutes and rules:	
Clayton Act, 15 U.S.C. 16 *et seq.*:	
Section 5	5, 9, 11-13, 15
Section 15	16
Multidistrict Litigation Act, 28 U.S.C. (Supp. IV) 1407	8

Statutes and rules—Continued

Federal Rules of Civil Procedure: Page
Rule 24 . . . 5, 6, 9, 80
Rule 42 . . . 6, 8
Congressional:
51 Cong. Rec. 15638, 15825, 16276 . . . 11
Consent Decree Program of the Department of Justice, Subcommittee No. 5, House Committee on the Judiciary, 86th Cong., 1st Sess. (Comm. Print 1959) . . . 11, 12
Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on S. 2512, 89th Cong., 2d Sess . . . 12
S. 2512, 89th Cong., 1st Sess . . . 13
S. 2157, 91st Cong., 1st Sess . . . 14
S. Doc. 584, 63rd Cong., 2d Sess . . . 11
S. Rep. 454, 90th Cong., 1st Sess . . . 9
Miscellaneous:
2 CCH Trade Reg. Rep. ¶8811 . . . 14
Department of Justice Press Release of September 11, 1969 . . . 14
5 Moore's *Federal Practice* 42-21 to 42-22 . . . 8

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1121

CITY OF NEW YORK

v.

UNITED STATES OF AMERICA, ET AL.

No. 1122

MARSHALL H. GROSSMAN AND S. JEROME TAMKIN

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the order of the district court be affirmed.

STATEMENT

These are direct appeals from an opinion and order of the district court (J.S. No. 1121, App. 9a-15a) entered in a government antitrust action against the four major automobile manufacturers and their trade association; the order denied appellants' motions to

intervene in opposition to a final consent judgment (J.S. No. 1122, App. 1–12) and to consolidate.

1. After lengthy investigation,[1] the United States, on January 10, 1969, filed a civil complaint against General Motors Corporation, Ford Motor Company, Chrysler Corporation, American Motors Corporation, and Automobile Manufacturers Association, Inc., charging that the defendants had conspired "to eliminate all competition among themselves in the research, development, manufacture and installation of motor vehicle air pollution control equipment" and "to eliminate competition in the purchase of patents and patent rights from other parties covering motor vehicle air pollution control equipment" (J.S. No. 1121, App. 21a, ¶ 13). In addition to seeking general injunctive relief against similar collusive behavior, the complaint sought prohibition of certain specific practices, including: joint assessment of patents or patent rights relating to air pollution control technology (*id.* at 24a, Prayer ¶ 2(b)(3)), agreement to condition the acquisition of patent rights relating to air pollution technology upon availability of such rights to others on a most-favored-purchaser basis (*id.* at 24a, Prayer ¶ 2(b)(4)), and joint responses to requests by government regulatory agencies for information concerning air pollution control technology (*id.* at 24a, Prayer ¶ 2(b)(5)). The complaint also asked for the cancellation of a July 1955 patent

[1] A grand jury had investigated the matter for eighteen months, but the investigation concluded in December 1967 without the return of an indictment.

cross-licensing agreement, the issuance to any interested applicant of royalty-free licenses under all United States patents to which that cross-licensing agreement has been applicable, and the provision to any such applicant of all other know-how relating to air pollution technology which has been exchanged among the defendants (*id.* at 25a, Prayer ¶ 3; 2(c)).

2. Negotiations concerning a possible consent judgment began shortly after the complaint was filed. On September 11, 1969, the parties filed a proposed consent judgment with a stipulation that the judgment could be entered after 30 days unless the government withdrew its consent in the interval.

The judgment requires that the 1955 cross-licensing agreement be terminated (J.S. No. 1122, App. 8, ¶ V), that the manufacturing defendants provide any person royalty-free licenses on any patents licensed under the 1955 agreement, and that the Association make available to any person for copying technical reports prepared by the defendants pursuant to the cross-licensing agreement within two years prior to the decree (*id.* at App. 9, 10; ¶ VI(A)(1), (3)). It prohibits the defendants from agreeing with any other defendant or manufacturer to engage in certain specific practices. There are, for example, bans against: cross-licensing of patents or patent rights on pollution control devices where the cross-license includes patents or patent rights acquired subsequent to the date of the cross-license (*id.* at App. 5, ¶ IV(A)(2)(b)); joint assessment of the value of patents or patent rights of any third party relating to such devices

(*id.* at App. 5, ¶ IV(A)(2)(e)); agreeing to condition acquisition of patent rights on pollution control devices upon availability of such rights to others upon a most-favored-purchaser basis (*id.* at App. 5, ¶ IV(A)(2)(f)); joint responses to governmental bodies regarding standards or regulations of air pollution control technology (*id.* at App. 6, ¶ IV(A)(2)(g)); and exchange of restricted information relating to pollution control devices (*id.* at App. 5, IV(A)(2)(a)). The decree also contains a general injunction against combining to restrain the development, manufacture, installation, distribution or sale of motor vehicle air pollution control equipment (*id.* at App. 5, ¶ IV(A)(1)).

On September 17, 1969, the court invited all interested persons and public bodies to submit their views as to whether the proposed final decree should be approved; it scheduled a public hearing on the matter for October 28, 1969. In response to this invitation, twenty-three persons, organizations and government bodies filed papers with the court, both in support of and in opposition to the proposed decree. The government, after examining these comments, urged that paragraph VI(A) be modified to give greater rights to those receiving patent licenses and technical know-how; as a result, on October 17, 1969, the parties stipulated to strike from paragraph VI(A) a proviso which would have required licensees and recipients of know-how to agree to grant the defendants licenses under any future patents based upon information the defendants were required to provide.

3. Twelve petitions to intervene were filed by various governmental bodies and individuals, of which all but one were treble damage claimants.[2]

The appellant in No. 1121, the City of New York, petitioned to intervene under Rule 24 of the Federal Rules of Civil Procedure. The City stated that it was in the process of preparing a treble-damage antitrust suit against the defendants for the same violations of law charged in the complaint of the United States and contended that it therefore had an interest in the case. The City asked the court not to approve the proposed decree until the United States presented "a record" proving that the decree was in the public interest, or unless the decree was amended to include an "asphalt clause."[3] It also asked the court to impound and make available to treble-damage plaintiffs the documentary evidence generated by the Justice Department and grand jury investigations.

The appellants in No. 1122 are treble-damage plaintiffs who moved to consolidate their case (which was

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[2] The applicants other than the appellants were County of Los Angeles, County of Santa Barbara, Bay Area Air Pollution Control District, Air Pollution Control District of the County of Los Angeles, State of New York, State of Connecticut, State of Maryland, State of New Jersey, American Civil Liberties Union, two aldermen from the City of Chicago, and William J. A. Sturtz (J.S. No. 1121, App. 10a).

[3] An "asphalt clause" is an admission of violation of Section 1 of the Sherman Act that would, under Section 5(a) of the Clayton Act, constitute prima facie evidence of violation. It derives its name from three related cases involving the asphalt industry—the only instance in which such a provision has been included in a consent decree. *United States* v. *The Lake Asphalt and Petroleum Co. of Mass.*, 1960 Trade Cases ¶ 69,835.

filed on September 17, 1969) with the government's under Rule 42(a) of the Federal Rules of Civil Procedure. They objected to the proposed decree on substantially the same grounds as those urged by the City of New York.

4. After considering the petitions to intervene and the written comments of interested persons, and after hearing oral comments presented by the appellants and others, the court denied the requested intervention and consolidation. It then found the proposed consent decree in the public interest and approved it. The court also ordered that all evidence obtained in the course of investigating the case be impounded in the Justice Department "where it may be obtained by treble damage claimants, or others, by subpoena or other appropriate means, where good cause" is shown (J.S. No. 1121, App. 13a). The court's opinion explained that the petitioners had failed to establish a right to intervene under Rule 24(a) and that permissive intervention under Rule 24(b) was not warranted since its purpose was to defeat the entry of the consent decree (*id.* at 10a–12a). Noting that the decree provided all the relief the government could have obtained had it won at trial, the court held that the decree was in the public interest (*id.* at 13a–15a).

ARGUMENT

The consent decree in this case provides substantially all of the relief which the government could have obtained if it succeeded in proving its allegations at trial. The decree has put an end to the alleged anticompetitive practices charged in the complaint; it has

assured future competition in the development and marketing of automobile anti-pollution devices by specific provisions which dissipate the effects of the alleged past anticompetitive practices; and it makes comprehensive relief available forthwith, without the risks and delays of litigation.

Among the principal elements of relief are requirements for royalty-free disclosure of all the patents and technical know-how exchanged during the period of the alleged conspiracy; prohibitions against collusive arrangements relating to research, development and marketing of new devices, including a bar against joint statements to government agencies; and provisions restricting future, and annulling past, patent pool arrangements. This comprehensive relief was entered by the court only after a full day's hearing on the proposed judgment in which numerous individuals, organizations and public parties participated both orally and by means of written submissions.

Appellants' principal objections are not that this multifaceted decree is inadequate to dissipate the anticompetitive effects of the conduct alleged in the complaint, but that it does not contain an "asphalt clause" for the benefit of treble damage claimants which would simplify their treble damage suits; that the decree was entered without the taking of evidence as to its public interest aspects; and that it is limited to the relief prayed for in the complaint. None of these contentions warrants upsetting the decree.

1. The appellants in No. 1122, Messrs. Grossman and Tamkin, lack standing to raise these questions.

They are not parties in this case and did not seek to intervene as parties. Instead they moved under Rule 42(a), F.R. Civ. P., to consolidate their newly filed treble damage suit with the government's suit in equity.[4] Consolidation, however, is a matter of judicial convenience and economy designed to avoid repetitious trials of the same issues. The very terms of Rule 42 emphasize that consolidation is a matter of the district court's discretion, since it provides only that the court "may" order consolidation. Moreover, consolidation does not affect any party's substantial rights or confer a power of veto by one consolidated plaintiff over the rights of another. See 5 Moore's *Federal Practice* 42–21 to 42–22. Accordingly, even if the government's action had been consolidated with the treble damage action of Messrs. Grossman and Tamkin, they would have no standing to complain about the settlement.[5]

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[4] Rule 42(a) provides:

"When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

[5] We know of no case in which a government suit in equity for equitable relief under the antitrust laws has been consolidated with a private treble damage action. Not only might serious jury trial problems be raised by the combination of the equity and law actions (see *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, and *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469), but the very difference in the objectives of the two suits militates against such consolidation. For this reason the Multidistrict Litigation Act, 28 U.S.C. (Supp. IV) 1407(g), expressly exempts government antitrust suits from its provisions

2. Although the City of New York moved for intervention under Rule 24(a)(2), F.R. Civ. P., on the ground that it intended to file a private treble damage suit,[6] it is well established that such an interest does not authorize intervention. *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal.), affirmed *sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580; *United States* v. *Harper and Row, Publishers, Inc.* (N.D. Ill. 1967, unreported), affirmed *sub nom. City of New York* v. *United States*, 390 U.S. 715. While inclusion of an "asphalt clause" would obviously facilitate the prosecution of private damage suits, the absence of this collateral benefit from a consent decree does not "impair or impede" a pri-

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for consolidated pre-trial. This exemption "* * * was requested by the Department of Justice and concurred in by the coordinating committee and the Judicial Conference of the United States, on the basis that the consolidation might induce private plaintiffs to file actions merely to ride along on the Government's cases. Government suits would then almost certainly be delayed, often to the disadvantage of those injured competitors who would predicate damage actions on the outcome of the Government's suit. Furthermore, since section 5(b) of the Clayton Act (15 U.S.C. 16(b)) tolls the statute of limitations during the pendency of the Government's action, there is no need for injured competitors to join in the Government's suit." (S. Rep. 454, 90th Cong., 1st Sess., p. 6.)

[6] Rule 24(a)(2) provides:

"Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

vate treble damage plaintiff's ability effectively to pursue his claim within the meaning of Rule 24(a)(2).

Nor do the City's public interest objections (which have not been pursued by the other public bodies which sought to intervene) warrant intervention. Except where a previous judicial mandate is involved, whether and on what terms a government antitrust suit should be settled is a matter committed by Congress to the exclusive responsibility of the Attorney General. *United States* v. *Swift & Co.*, 276 U.S. 311, 331–332. Thus, where an applicant for intervention objects to a proposed decree primarily on the ground that it does not serve the public interest represented by the Attorney General, and the applicant's ability to protect its private rights under the antitrust laws is not impaired or impeded, intervention is normally denied.[1]

3. There is no legal basis for the appellants' contention (J.S. No. 1121, pp. 6–9; J.S. No. 1122, pp. 17–18) that the district court may compel an antitrust defendant to accept a particular term in a consent decree. While approval of a proposed consent decree is a judicial act (*United States* v. *Swift & Co.*, 286 U.S. 106, 115), elementary concepts of due process bar the district court from imposing a decree without trial upon an antitrust defendant who does not consent. Similarly, the government may insist upon trial where there is a *bona fide* disagreement over elements

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[1] See, *e.g.*, *United States* v. *Blue Chip Stamp Co.*, *supra*; *United States* v. *Harper and Row, Publishers, Inc.*, *supra*; *Lupton Manufacturing Co.* v. *United States*, 388 U.S. 457; *Pioneer National Title Ins. Co.* v. *United States*, 385 U.S. 1022.

of relief to which it may be entitled. *United States* v. *Ward Baking Co.*, 376 U.S. 327, 334–335. To be sure, *Ward Baking* reserved the question whether "where there is agreement on every substantive item of relief, insistence by the Government upon an adjudication of guilt as a condition to giving its consent to a judgment would conflict with the congressional policy embodied in § 5 of the Clayton Act * * *." 376 U.S. at 334. But that issue is not presented in this case since the government did not insist upon such a condition. Cf. *United States* v. *Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E.D. Wisc.).

Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), provides in substance that government antitrust judgments have a prima facie effect in private suits, except "consent judgments or decrees entered before any testimony has been taken * * *." Congress intended by this exception to encourage defendants to settle government antitrust suits before trial (see S. Doc. No. 584, 63rd Cong., 2d Sess., p. 6; 51 Cong. Rec. 15638, 15825, 16276). And by it, "Congress indirectly has recognized the Attorney General's authority to utilize consent settlements to terminate antitrust litigation" (*Consent Decree Program of the Department of Justice*, Subcommittee No. 5, House Committee on the Judiciary, 86th Cong., 1st Sess. (Comm. Print 1959) p. 1). The exception has been of great practical importance to the effective administration of the antitrust laws, for it has enabled the government to make the most effective use of its enforcement resources with-

out having to try every case which involves potential treble damage liability.[*]

The instant decree reflects just the kind of negotiations that Congress contemplated. The defendants indicated that they would agree to a decree containing substantially all the equitable relief sought by the government, but refused to accept an "asphalt" clause (J.S. No. 1124, App. 12a). The Attorney General, through the Antitrust Division, weighed the public interest in prompt substantive relief against the risks and delays of litigation, and concluded that an immediate decree without an "asphalt" clause best served the public interest.

In deciding whether to adopt a proposed consent decree a district court, as a practical matter, may accept it as submitted, may invite further negotiations, or may force the government to choose between trial of the merits and dismissal if satisfactory modifications cannot be negotiated. But in making this determination it is not the court's function to weigh de novo the Attorney General's balancing of the considerations leading to settlement. This is true whether the impact of the case is large or small. Such a judicial inquiry would in effect require a trial on the entire congeries of factors bearing on settlement—including the strengths and weaknesses of the government's theory,

[*] More than 70 percent of government antitrust injunction suits have been terminated by consent decrees. *Consent Decree Program of the Department of Justice*, *supra*, pp. 7-10; Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on S. 2512, 89th Cong., 2d Sess., pp. 86-87.

the difficulties of proof, the time that might be required for discovery and trial, the possible relief that might be obtained in the light of the risks of litigation, the resources to be committed in the light of alternative needs, and the public consequences of delay in correcting the competitive injury alleged. The hearing would be more complex than a trial on the merits, and it would apparently involve a trial of the Attorney General's good faith and good judgment. This kind of intrusion into prosecutorial discretion would be inconsistent with both the constitutional nature of the judicial power and traditional concepts of the adversary process.

More specifically, the requirement of such a hearing would be inconsistent with the very nature of a consent decree, which this Court has held does not depend for its validity upon any factual showing. *Swift & Co.* v. *United States*, 276 U.S. 311, 327. The practical impact of such a radical revision of Section 5 on the Department's enforcement efforts would be crippling, since virtually every case involving potential treble damage liability would have to be tried. Moreover, an evidentiary hearing on the propriety of a proposed consent decree would result in a decree "entered after testimony has been taken" to which the prima facie effect attaches. This result would read out of the Clayton Act Section 5(a)'s exception for consent decrees—a step Congress has declined to take.[8]

[8] S. 2512, 89th Cong., 1st Sess., would have given prima facie effect to decrees entered before the taking of testimony. Hearings were held on the bill (Hearings, n. 8, *supra*) but it was not reported. A bill which would give prima facie effect to nolo

4. Since the district court was being called upon to perform a judicial act, it obviously had a duty to examine the proposed consent decree to determine its suitability for adoption as a decree of a court of equity. Accordingly, as noted above, the court did comprehensively review the proposed decree from the standpoint of its enforceability, its relation to the prayer of the complaint, and its effect on the rights of non-parties and the overall public interest (J.S. No. 1121, App. 14a). After a full presentation of views submitted by interested persons both in writing and at a public hearing, the court found that "it provides the Government with substantially all the relief that it could have obtained if it had tried the case and won" (*ibid.*). Thus the court below exercised the broadest standard of review appropriate to consideration of proposed government antitrust consent decrees, and there is no need in this case to attempt to define the minimum acceptable judicial role in the consent decree process.[10]

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contendere pleas, but would leave the law unchanged with respect to consent decrees entered prior to testimony, has been introduced in the current Congress. S. 2157, 91st Cong., 1st Sess.

[10] Appellants in No. 1122 also claim that notice of the hearing on the proposed judgment was inadequate (J.S. No. 1122, p. 13). In this case, the Department followed its customary practice of filing the proposed consent decree at least thirty days before it was submitted for the court's approval and of issuing a descriptive press release which was reported by the various wire services and the national and local press. Dept. of Justice Press Release of September 11, 1969. See 2 CCH Trade Reg. Rep. ¶ 8811. Moreover, on September 17, 1969, the district court ordered that copies of the proposed decree be served upon all

We stress that the proposed judgment fully terminated all the defendants' allegedly anticompetitive practices as demanded by the government, restored the competitive conditions claimed to have been destroyed, and provided safeguards against resumption of the challenged practices.[11] Thus settlement of this case completely accomplished the government's objective in filing the suit, and it did so without the uncertainty, delay and expense that would have resulted had the case gone to trial. The district court's approval of the consent judgment mirrors the congressional determination expressed in Section 5 of the Clayton Act that in such circumstances the desirability of a prompt settlement outweighs any failure to provide a further benefit to the private plaintiffs. The district court, therefore, properly exercised its discretion in adopting the consent decree.

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applicants for intervention. Messrs. Grossman and Tamkin were not served in this manner because they did not file their motion until October 3, 1969. But they, and large numbers of other persons representing widely varying viewpoints, had actual notice and appeared at the district court's hearing of October 28, 1969. Moreover, *Mullane* v. *Central Hanover Tr. Co.*, 339 U.S. 306, cited by appellants, is inapposite. It involved a trustee's failure to give notice by mail to beneficiaries whose identity and location were known to the trustee of a proceeding for settlement of accounts which could deprive such persons of substantial property rights. The proposed decree does not affect appellants' property rights or their right to sue.

[11] Since appellants contend that this case presents the issue reserved in *Ward Baking* (see discussion *supra*, pp. 10–11), they evidently would concede that here there has been "agreement on every substantive item of relief" (376 U.S. at 334), and that if the decree included an "asphalt clause" the court's approval of it would be correct?

Somewhat inconsistently, petitioners also suggest that under the catchall clause of the prayer ("such other, further and different relief as the nature of the case may require") the gov-

CONCLUSION

The order of the district court denying appellants' respective motions to intervene and to consolidate should be affirmed.

Respectfully submitted.

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FEBRUARY 1970.

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ernment might be entitled after trial to an order requiring that all cars manufactured during the conspiracy be recalled and equipped with anti-smog devices (J.S. No. 1121, p. 9, n. 11; J.S. No. 1122, p. 16). Whether such relief—which goes not to termination and correction of defendants' anti-competitive behavior, but rather to remedying non-competitive injury which may be a consequence of the allegedly anti-competitive practices—might ever be appropriate in a suit by the government under Section 15 of the Clayton Act, it seems clear that, in light of the novelty of such relief and the fact that it was not specifically prayed for in the complaint, its omission from the consent decree should not be the basis for denying the public the benefits of the comprehensive traditional antitrust relief agreed to by the Attorney General and approved by the court below. Whether such ancillary relief may be obtained by States or their sub-divisions suing as *parens patriae*, or by properly defined classes of individuals, should be determined in private equity suits brought for this purpose.

U.S. GOVERNMENT PRINTING OFFICE: 1970